ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Application by Ameritech Michigan	)	CC Docket No. 97-137
Pursuant to Section 271 of the	)	
Telecommunications Act of 1996 to	)	
Provide In-Region, InterLATA Services	)	
in Michigan	)	

REPLY COMMENTS OF BELL ATLANTIC AND NYNEX[1]

In passing the 1996 Act, Congress had one overriding objective: to open all telecommunications markets to competition, including the local and long distance markets alike. In keeping with that goal, the Act permits a Bell operating company to provide in-region long distance service once it has opened its local market to competition by satisfying each of 14 items in a statutorily prescribed checklist, and has made each of those items available, or offered to make them available, to competing local exchange providers.

Despite these straightforward statutory requirements, a number of parties here ask the Commission to override the decisions made by Congress, and to erect a series of anticompetitive regulatory barriers to new long distance competition. For example, they claim that the Commission should add new requirements to the checklist despite an explicit statutory prohibition against doing so, and should reinvent the Act's public interest standard to include

[1] "Bell Atlantic" includes Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc., and Bell Atlantic Communications, Inc. "NYNEX" includes New York Telephone Company and New England Telephone and Telegraph Company.

requirements that are unrelated to the long distance authorization being sought, or that were expressly rejected by Congress.[2]

ARGUMENT

I. Efforts To Rewrite The Specific Statutory Requirements Imposed By Congress Must Be Rejected

Not content with the standards actually adopted by Congress in section 271, the long distance incumbents urge the Commission effectively to rewrite the specific provisions of section 271(c)(2) that govern what a Bell company must show to demonstrate that its local market is sufficiently open to qualify for long distance relief. The long distance incumbents repeat their usual claims that each checklist item must be included in a single agreement, and that a Bell operating company must actually be furnishing each checklist item to that single competitor. E.g., CompTel Br. 11-14; LCI Br. 1-3; MCI Br. 8-15; Sprint Br. 3-6. See also AT&T Br. 8; ALTS Motion to Dismiss at 13-19.[3]

But contrary to the claims of the long distance incumbents, section 271(c)(2) is clear about what is required for the Bell company to demonstrate that its local market is sufficiently open to qualify for relief. See Bell Atlantic Br. 2-4. A Bell operating company meets the

[2] As Bell Atlantic noted in its Comments, the undersigned companies are not in a position to address the specific facts relied on by Ameritech, or the conflicting version of facts relied on by those opposing Ameritech's application. Comments of Bell Atlantic at 1 ("Bell Atlantic Br."). Instead, these reply comments are limited to legal issues raised in the comments of various parties that have applicability beyond the specific facts of Ameritech's application.

[3] ALTS also asks the Commission to rule, in the context of Ameritech's application, on whether ISP traffic is interexchange traffic that is not eligible for reciprocal compensation, an issue that is pending in another docket. ALTS Motion at 40-44. To the extent that that question is deemed relevant to the determination of Ameritech's application, Bell Atlantic and NYNEX incorporate by reference their comments (filed March 24, 1997) and reply comments (filed April 23, 1997) in In the Matter of Access Charge Reform, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, CC Docket Nos. 96-262, et al., FCC 96-488 (rel. Dec. 24, 1996), and will not repeat the arguments here.

requirements of subparagraph (A) if it is "providing" access and interconnection under "one or more agreements," "or" it is "generally offering" access and interconnection under a statement of generally available terms. And it meets the requirements of subparagraph (B) if the access and interconnection being "provided or generally offered" includes each of the 14 items in the checklist set out in that section. On its face, therefore, this provision expressly allows the Bell operating companies to satisfy the checklist through one or more agreements, or through a combination of agreements and a statement, so long as all the items on the checklist are available through one or the other.

The long distance incumbents argue that a Bell operating company filing under Track A must actually be furnishing each of the checklist items to a qualifying competitor. See Bell Atlantic Br. 5-6. As the Department of Justice explains, however, the relevant test for purposes of determining checklist compliance is not whether competitors have chosen to actually use each item on the checklist, but whether each of the items is "available." DOJ Br. 11; DOJ Oklahoma Evaluation at 23. Indeed, this is the only standard compatible with the express terms of the Act. Because a principal definition of "provide" is "to make available," Random House Unabridged Dictionary (2d ed.), the Act by its terms makes clear that a Bell company either must make available, or generally offer to make available, each of the items on the checklist.

The long distance incumbents claim that allowing a Bell company to meet the checklist by making available, rather than actually furnishing, a required item, would read the distinction between Track A and Track B out of the Act. E.g., CompTel Br. 10-12; LCI Br. 1-2; MCI Br. 12-13. But there simply is no statutory link between the method for showing checklist compliance under paragraph (c)(2) and the track available under paragraph (c)(1). Rather, a

Bell company must show that it is providing or generally offering the items on the checklist. Separate from that, it must show either that there is a certain type of competitor operating in the state under an approved interconnection agreement or that no such competitor has made a timely request for interconnection — Track A or Track B. But whether it follows one track or the other for purposes of determining when it can file has nothing to do with how it demonstrates that it has satisfied the checklist.

The result urged by the long distance incumbents makes no practical sense. If a Bell company were not allowed to demonstrate compliance with the checklist through more than one agreement, or through a combination of agreements and a statement, it could readily find itself caught in a procedural Catch 22 — having fully opened its network, yet with no way into the long distance business. So long as no single competitor chose to include all the checklist items in its agreement, a Bell company could never meet the checklist. To make sure this could not happen, the Act expressly allows a Bell company to demonstrate compliance with section 271(c)(2) through a statement of terms, and to do so independent of how it complies with section 271(c)(1).

II. Efforts To Add New Requirements To Those Imposed By Congress Must Be Rejected

A. The Competitive Checklist Cannot Be Expanded to Require Fully Automated Access to Operations Support Systems

Despite an express statutory prohibition against expanding the terms of the competitive checklist, § 271(d)(4), the long distance incumbents, again joined by the Department of Justice, urge the Commission to add a new term to the checklist, and to require that the Bell companies

provide, at least in some circumstances, fully automated access to their operations support systems. This requirement has no basis in the statute.

On the contrary, while the Commission has concluded that incumbent carriers must provide non-discriminatory access to their existing operations support systems, it also has made it clear that they may do so in any way that allows competitors to provide service in "substantially the same time and manner" that the incumbent provides service to its own customers. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 518 (1996) ("Local Interconnection Order").[4] So long as a Bell company can demonstrate that it has processes in place that are reasonably designed to meet this standard, there simply is no rational reason to deny it long distance relief solely because its internal systems for processing orders (once they have been received from a competitor) may, in some instances, require a degree of manual intervention.

B. The Public Interest Standard Is Not a Broad License to Add Requirements That Are Unrelated to the Long Distance Authority Being Sought

The long distance incumbents and the Department of Justice also join together in arguing that the Commission should convert the "public interest" standard into a broad license to add new local competition standards to the requirements of the Congressionally-specified checklist. Their argument must be rejected.

[4] The Commission found in August 1996 "that incumbent LECs . . . have made significant progress" in "modifying their networks to provide requesting carriers access to OSS functions." Local Interconnection Order, ¶ 525. Four months later, the FCC pointedly noted that it was "encouraged by reports that this progress has continued." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket. No. 96-98, Second Order on Reconsideration, 11 FCC Rcd 19738, ¶ 10 (1996).

The most basic problem with the argument is simple: It is fundamentally inconsistent with the carefully specified and exhaustive competitive checklist adopted by Congress (after extensive legislative negotiations and compromise), § 271(c)(2)(B), and with the express statutory command that the Commission may not add to (or subtract from) the terms of that checklist, § 271(d)(4). These provisions together make it abundantly clear that Congress pointedly decided itself to specify the required local competitive conditions necessary to obtain long distance relief, precisely to avoid the sort of open-ended inquiry that these parties seek to reintroduce.[5] As a result, these parties' position violates basic principles of statutory construction demanding that a statute be read to give coherence to the whole statute: that one provision cannot be read to negate, contradict, or undermine others;[6] and that specific provisions addressing a particular issue (here, the openness of local markets) should not be displaced by an unlawful and unwarranted interpretation of other provisions.[7]

Moreover, the substance of the Department's position is incompatible with other critical indicators of Congressional intent. First, while the Department has cast its argument in the guise of ensuring that local markets are "irreversibly opened to local competition," the specific

[5] The Department recognized the problem presented by this inconvenient aspect of the statute, and attempts to explain it away by reading the command not to "limit or extend the terms used in the competitive checklist," § 271(d)(4), to mean nothing but "follow the checklist." DOJ Oklahoma Evaluation at 37 n.44. But that construction improperly reads the provision out of the Act (see, e.g., Ratzlaf v. United States, 114 S.Ct. 655, 659 (1994)) and ignores its reason for being there: A considered judgment that the checklist fully exhausts the subject it addresses, namely, the openness of local markets to competition.

[6] See, e.g., United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988); Grade v. National Solid Wastes Mgt. Ass'n, 112 S.Ct. 2374, 2384 (1992).

[7] See, e.g., Custis v. United States, 114 S.Ct. 1732, 1736 (1994); John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank, 114 S.Ct. 517, 524 (1993); West Virginia Univ. Hosp., Inc. v. Casey, 449 U.S. 83, 92 (1991); Green v. Block Laundry Mach., Co., 490 U.S. 504, 524-26 (1989).

argument, made both by the Department and the long distance incumbents, that competitors must be operating on a commercial scale is precisely the type of minimum level of competition standard that Congress expressly rejected, see Bell Atlantic Br. 6-8 (and authorities cited therein).

In effect, the Department proposes to use the "public interest" standard as leverage to obtain something that Congress rejected in the legislation -- expansion of the checklist requirements to include a showing of market share loss. The Department's purported justification for doing so is the claim that a Bell company's "incentive" to open its local market will allegedly be diminished once it receives long distance relief. Even apart from the fact that the Commission has other tools at its disposal to address this concern,[8] this argument simply proves too much for it would allow any requested approval under a "public interest" standard to be withheld solely to extract a concession undermining the hard-fought compromises that resulted in the provisions of the Act.[9]

Second, unlike the consideration whether the requirements of the competitive checklist have been met, the focus of the public interest inquiry cannot properly be placed on the local market. The inquiry into the public interest that the Commission is authorized to undertake by

[8] Among other things, the Act expressly authorizes the Commission to revoke a Bell company's long distance authority at any time if it "has ceased to meet any of the conditions required for" long distance entry, § 271(d)(6). And, of course, the various enforcement mechanisms available to the Commission are backed up by the federal and state antitrust laws, § 601(b)(1), including the availability of treble damages.

[9] Cf. In the Matter of Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes, Report & Order, 5 FCC Rcd 3911, ¶10 (1990) (changing policy of permitting license applicants to pay money to commenters in exchange for dropping objections because this policy permits commenters "to reap benefits that are unrelated to the operation of the station in the public interest").

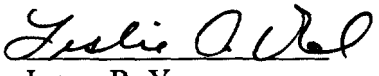
the Act is whether "the requested authorization" — that is, the ability to provide in-region long distance service — is in the public interest. As a result, what is relevant to that inquiry is the market the Bell company seeks authority to enter. In fact, the Conference Report's reference to possible "standards" for the Attorney General's own evaluation includes consideration of the market to be entered in each of the specific examples it gives. Conf. Rep. 149. Because the Department's position does not give adequate consideration and weight to the pro-competitive effects of Bell company entry on the long distance market, it provides no basis for rejecting the application on public interest grounds.

Section 271(d)(2)(A) provides that the Attorney General may conduct an "evaluation" of an application using any standard, and that the Commission is to give "substantial weight" to that "evaluation." While that provision allows the Department of Justice to do what is it institutionally suited to do — evaluate the long distance authorization being sought and to pass that assessment along to the Commission — it cannot alter the substantive standards that govern the Commission's own determination. In particular, it cannot override the commands of the competitive checklist or the statutory prohibition against expanding that checklist. And because the only role assigned to the Attorney General is to "consult" with the Commission in making its determination, it would make nonsense of the Act to suggest that the Commission could use the Department's evaluation, in effect, to adopt or apply a standard that is incompatible with the limits imposed by the Act on the Commission itself. That is why the Act expressly provides that the Attorney General's evaluation "shall not have any preclusive effect" on the Commission's decision.

Finally, broad invocations of a statutory "purpose" to promote competition cannot substitute for, or overcome, the careful compromises reflected in the statute itself. Compare DOJ Oklahoma Evaluation at 39-40. "Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of legislative intent." Board of Governors v. Dimension Financial Corp., 474 U.S. 361, 374 (1986); see Rodriguez v. United States, 480 U.S. 522, 525-26 (1987). Congress specified the checklist as the limit of inquiry into the openness of local markets. A demand for additional requirements on that subject defeats, rather than respects, Congressional intent.

In short, a reading that would result in acceptance and application by the Commission of the Department's and other parties' proposed public interest standard would violate the fundamental obligation of courts (and agencies) to make "sense rather than nonsense" out of the entire relevant law, (West Virginia Univ. Hosp., 449 U.S. at 92), and must be rejected.

Respectfully submitted,



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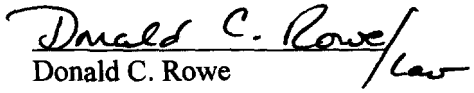

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